

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 24, 2005

HERSHELL JERRY FRIZZELL, JR. v. MOHAWK INDUSTRIES, ET AL.

**Appeal from the Circuit Court for Marion County
No. 14344 Buddy D. Perry, Judge**

No. M2004-01598-COA-R3-CV - Filed on May 15, 2006

An employee of Mohawk Industries filed this retaliatory discharge action contending he was wrongfully terminated because he filed a workers' compensation claim for benefits. Mohawk denies he was fired because of the workers' compensation claim and insists he was fired due to repeated violations of its attendance policy. Following discovery, Mohawk filed a motion for summary judgment contending Plaintiff failed to establish his workers' compensation claim was a substantial factor in the motivation to terminate his employment. The trial court granted the motion. Plaintiff appeals contending genuine disputes of material fact exist. Finding no error, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Alexander W. Gothard, Chattanooga, Tennessee, for the appellant, Hershell Jerry Frizzell, Jr.

J. Harvey Cameron, Jasper, Tennessee, for the appellee, Mohawk Industries, d/b/a Galaxy Carpet Mills, Inc.

OPINION

Hershell Jerry Frizzell, Jr., was hired as a card operator by Mohawk Industries, d/b/a Galaxy Carpet Mills, Inc., in June of 1996. He was injured during the course and scope of his employment on August 8, 1999. He filed a complaint for workers' compensation benefits in November of 1999.¹ Ten months later, on September 13, 2000, Mohawk terminated Frizzell's employment. Thereafter, Frizzell filed this action, contending he was terminated because he filed a claim for workers' compensation benefits. Mohawk denies the allegation and contends Frizzell was terminated due to repeated violations of company policies, particularly attendance policies.

¹The claim was settled in January of 2002.

The termination notice given to Frizzell listed the following reasons for his termination: 1) Frizzell's failure to report to work on September 11, 2000; 2) a warning for violation of the attendance policy issued on April 17, 2000; and 3) a warning for failure to follow instructions issued on February 9, 2000 as the reason for his dismissal. Subsequently, an unemployment separation notice was sent to the State of Tennessee listing only attendance policy violations for Frizzell's termination. The separation notice sent to the State listed: 1) a failure to report to work on January 30, 2000; 2) a warning for violation of the attendance policy issued on April 17, 2000; and 3) a failure to report to work on September 11, 2000.

At the inception of his employment, Mohawk provided to Frizzell its personnel policy manual. Pursuant to the attendance policy, an employee who had six occurrences would be written up, and possibly suspended, and if the employee accumulated more than eight or more occurrences within a twelve-month period, he could be discharged.²

Frizzell received several written notices for violating company policy over the course of his employment at Mohawk. Some notices were issued prior to his filing a workers compensation claim and some were issued after the filing. Prior to filing, Frizzell was issued two written notices, in August and June 1997, for negligence in job performance and failure to follow instructions, respectively. The next two notices were due to six occurrences within a twelve-month period and were issued in December 1998 and January 1999. On October 18, 1999, he was given another disciplinary notice for not calling in to inform his supervisor he would not be at work. His sixth warning was issued January 17, 2000, after Frizzell had filed his workers compensation claim, for violation of a safety rule. Again in January 2000 Frizzell failed to call in to notify his supervisor he would not be at work and received another written notice. In February of 2000, Frizzell was given written notice and suspended for abusing phone privileges, and in April he was again given written notice and suspended for violating the attendance policy due to seven occurrences. Frizzell's final disciplinary notice was on September 13, 2000 for failing to inform his supervisor he would not be coming to work.

In August 1999, Frizzell sustained a work-related injury to his back. He timely reported his injuries. Frizzell continued to work for the next thirteen months, although he stayed in the First Aid Room the first two weeks following his injury and remained on light duty thereafter until his employment was terminated on September 13, 2000.

² Mohawk's personnel policies provide for discipline for violation of the attendance policy. An "occurrence" is defined as any absence or leave of absence regardless of the reason except for workers' compensation leaves, death in the family, jury duty, military leaves, vacation and holidays. Two occurrences of an employee being late for work or leaving early counts as one occurrence. If an employee has six occurrences in a twelve month period, the employee is to receive a written warning, seven occurrences in a twelve month period, a written warning and suspension and eight occurrences will result in a suspension or discharge. All unreported absences result in a written warning. Employees may work off occurrences by perfect attendance for a two month period.

Following discovery, Mohawk moved for summary judgment on the ground Frizzell did not prove a causal connection between the discharge and the workers' compensation claim, and Frizzell's repeated violation of the attendance policy is a legitimate non-discriminatory reason for the discharge. The trial court granted the motion. Frizzell appeals from that order, contending he established a prima facie case for retaliatory discharge.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mutual Automobile Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

In an action for discharge in retaliation for asserting a workers' compensation claim, the plaintiff must establish that: (1) he was an employee of the defendant at the time of the injury; (2)

he made a claim against the defendant for workers' compensation benefits; (3) the employer terminated his employment; and (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate his employment. *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 558 (Tenn. 1993). The burden of proof rests upon the plaintiff to prove the elements of the cause of action, including the causal relationship between the claim for workers' compensation benefits and the termination for employment. *Id.* Proof of discharge without evidence of a causal relationship between the claim and discharge does not present an issue for the jury on a claim of retaliatory discharge for the filing of a workers' compensation claim. *Id.*

If the employer presents a legitimate, non-discriminatory reason for the employment action, the burden shifts back to the employee to prove the employer's explanation is pretextual. In doing so, the employee "must present specific admissible facts, which realistically challenge the defendant's stated reasons." *Hubrig v. Lockheed Martin Energy Sys.*, No. 03A01-9711-CV-00525, 1998 WL 240128, at * 8 (Tenn. Ct. App. May 4, 1998); *see also Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986); *Silpacharin v. Metropolitan Government*, 797 S.W.2d 625, 629 (Tenn. Ct. App. 1990). The plaintiff may challenge the stated reason and thereby create a question of fact as to a pretextual defense by showing the employer's reasons "have no basis in fact, or if they have a basis in fact, by showing that they were not really factors motivating the discharge, or if they were factors, by showing that they were jointly insufficient to motivate the discharge." *Moore v. Nashville Elec. Power Bd.*, 72 S.W.3d 643, 652 (Tenn. Ct. App. 2001) (quoting *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329-30 (6th Cir. 1994)). The employee, however, faces summary dismissal of his claim if he is unable to demonstrate that he could prove the employer's reason for the discharge was pretextual. *DeVore v. Deloitte & Touche*, No. 01A01-9602-CH-00073, 1998 WL 68985, at *11 (Tenn. Ct. App. Feb. 20, 1998).

It is undisputed Frizzell was an employee of Mohawk at the time of the injury, filed a claim for workers' compensation benefits, and Mohawk terminated his employment thereafter. Therefore, there is no dispute concerning the first three of the four elements required to establish a retaliatory discharge claim. Since his case was summarily dismissed, the sole issue is whether Frizzell created a disputed fact concerning whether his workers' compensation claim was a substantial factor in his termination.

In order to establish the element of causation, the plaintiff must provide proof beyond the mere facts showing employment, exercise of rights under the Workers' Compensation Law, and subsequent discharge. *Thomason v. Better-Bilt Aluminum Prods., Inc.*, 831 S.W.2d 291, 293 (Tenn. Ct. App. 1992). The causal link between the filing of the workers' compensation claim and the discharge must be shown by either direct evidence or compelling circumstantial evidence. *Id.*; *see also Johnson v. St. Francis Hospital, Inc.*, 759 S.W.2d 925 (Tenn. Ct. App. 1988). Moreover, a plaintiff may not prevail on a retaliatory discharge claim merely by showing a causal connection exists between the work-related injury and the subsequent discharge. *Traylor v. North American Royalties Inc.*, No. E1999-00709-COA-R3-CV, 2000 WL 472872 (Tenn. Ct. App. April 24, 2000) (citing *Vaughan v. Harvard Indus., Inc.*, 926 F.Supp. 1340, 1350 (W.D. Tenn. 1996)). The plaintiff must establish the filing of the workers' compensation claim is the "true or substantial reason" for

termination. *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 685 (Tenn. Ct. App. 1999)(citing *Vaughan v. Harvard Indus., Inc.*, 926 F.Supp. 1340, 1350 (W.D. Tenn. 1996)); *see also Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). The plaintiff's subjective beliefs or speculations are also insufficient to create the requisite causal relationship. *Id.* (citing *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 (6th Cir. 1986)) (indicating that mere personal beliefs, conjecture, and speculation were insufficient to support inference of age discrimination).

The burden of proof on Frizzell is to present either direct evidence or compelling circumstantial evidence of the causal relationship between the filing of the claim and the discharge. Frizzell claims he was treated differently after his injury, and the disparate treatment is evidence that his compensation claim was a substantial factor motivating Mohawk's termination of his employment. The only evidence he presents to support this claim concerns three instances. One, he contends he was required to stay in "an 8 by 12 room" that was "very hot." Two, he was removed from the Safety Committee, which he contends was punishment for filing a workers compensation claim. Three, he states the reasons Mohawk identified in his termination notice were different from the reasons stated in the separation notice Mohawk sent to the State.

The "8 by 12 room" Frizzell complains of is the First Aid Room Mohawk uses to care for employees who become ill or sustain minor injuries at work. He states he was required to "sit in there all day" if he was unable to work. The record establishes that Frizzell only stayed in the First Aid Room during the first two weeks following his return to work, and the reason he was there was because he was experiencing difficulty performing his job during that period. Once his health improved and he was able to perform his job, he did not sit in the First Aid Room. As for being removed from the Safety Committee, Mohawk presented evidence of a long-standing policy that prohibited injured employees from serving on the Safety Committee. Mohawk additionally established that Frizzell was removed from the Safety Committee when his injury occurred, which was two months prior to Frizzell's filing a workers' compensation claim. The separation notice sent to the State identified attendance policy violations as the reason for Frizzell's termination. The termination notice provided to Frizzell cited two of the same attendance issues but substituted another policy violation for the third attendance issue as the reasons for termination.

The three instances of disparate treatment discussed above, considered in the light most favorable to Frizzell, fail to establish direct or compelling circumstantial evidence of the causal link and fail to create a dispute of fact that the filing of the workers' compensation claim was the true or substantial motive for termination. Moreover, Mohawk established a legitimate, non-discriminatory reason for termination, which Frizzell has not put at issue. Accordingly, Mohawk was entitled to summary dismissal of the complaint.

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Hershell Jerry Frizzell, Jr.

FRANK G. CLEMENT, JR., JUDGE